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No. 85-2097

In The
# Supreme Court of the United States
October Term, 1986

WEISSER OPTICAL COMPANY
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD
*Respondent.*

## REPLY TO BRIEF IN OPPOSITION

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The Board contends (br., p. 6) that certiorari should be denied because the decision below is "consistent with" a "uniform" case law holding that employers cannot taint a union decertification petition, and then rely on that petition to assert a good faith doubt that the union continues to enjoy majority status. This contention, however, begs the critical questions raised by this case: *first,* what is the

correct standard by which employer "taint" of a decertification petition is to be measured and, *second*, may employer "free speech" properly be considered as evidence that a decertification petition has been unlawfully tainted.

1. The Board mischaracterizes the question presented. It presumes that *any* casual relationship, however attenuated, between an employer's statements and an employee decertification petition fatally taints that petition. None of the decisions cited by the Board, apart from the "reasonable tendency" test adopted for the first time by the court below, support this sweeping proposition. The critical issue before this Court is thus the *degree* of causal relationship required to unlawfully taint a decertification petition. Is the correct standard the Seventh Circuit's "reasonable tendency" criterion or the more stringent "significant contribut[ion]" test of the Ninth and Fourth Circuits?

The error of the Board's view is further evidenced by its claim that the Company "does not dispute . . . that it violated the Act *by encouraging . . . a decertification petition.*" (br., p. 5 (emphasis added).) The Company has made no such concession. The Company has repeatedly contended, and the court below agreed, that "not all violations of [the NLRA] necessarily taint decertification petitions to the extent that there can be no possibility of a good faith reliance on the petition evidencing a lack of majority union support." (Pet. App. A, A-8.) Accordingly, even if the management actions here were unlawful and could be shown to have some nexus to the decertification petition, those findings would not, as the Board argues, complete the requisite analysis. The Board would

still have to determine whether the employer's conduct was sufficient to have "*significantly contribute*[*d*] to [the] loss of majority or to the factors upon which a doubt of such majority [was] based." *Hotel, Motel and Restaurant Employees Local 19*, 785 F.2d 796, 799 (9th Cir. 1986) quoting *NLRB v. Nu-Southern Dyeing & Finishing*, 444 F.2d 11, 16 (4th Cir. 1971) (emphasis added). Neither the Board nor the court below addressed this question. As a result, while the Company's refusal to bargain was unlawful in the Seventh Circuit where there is no "significant contribution" test, it may likely have been perfectly legitimate in the Fourth and Ninth Circuits. That is the critical conflict presented.

Employer conduct *vis-a-vis* a decertification effort lies on a continuum from silence to rampant threats and promises. The test for establishing employer "taint" of a decertification petition must be clearly demarcated on this continuum in order to provide guidance to employers seeking to act within the bounds of federal labor law. Review by this Court is warranted, therefore, to close the chasm between the "reasonable tendency" test applied below and the "significant contribut[ion]" test of the Ninth and Fourth Circuits.

2. Contrary to the Board's claim (br., p. 5, n. 5), the question of whether Company owner Hirsch's remark that he and the employees could work out their differences without a "third party" was privileged by Section 8(c) of the Act and the First Amendment is properly before this Court. It is not barred by Section 10(e) of the

NLRA.[1] Here, the principal issue before the Board's Administrative Law Judge, the Board itself, and the court below has always been the same—whether the Company engaged in conduct which so tainted its employees' decertification effort as to preclude the Company from asserting a good faith doubt as to the Union's continued majority status. Hirsch's comment was treated by both the Board (Pet. App. A, A-14) and the court below (Pet. App. A, A-9), contrary to the Company's position, as evidence that the Company violated Section 8(a)(5) of the Act. As the court below found with respect to a similar contention of the Board, the Company did not waive this issue (Pet. App. A, A-8, n. 5).

Moreover, the Board has again put the cart before the horse by asserting (br., p. 5, n. 6) that Hirsch's statement somehow "lost" its 8(c) privilege by virtue of the Board's finding that the "third party" remark was "an aspect of [the Company's] . . . sponsorship and encouragement of the decertification petition." It is beyond cavil that Section 8(c) "protects the right of an employer to state its view, arguments, or opinion" about a union. *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983); *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981). The protection of Section 8(c) and the employer's "First Amendment right to communicate his views to his

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[1] Section 10(e) precludes a reviewing court from considering objections that have not been urged before the Board absent a showing of extraordinary circumstances. 29 U.S.C. § 160(e). The purpose of this rule is to ensure that the Board has an opportunity to resolve all issues properly within its jurisdiction and to prevent repetitive appeals to the courts. *Local 900, I.U.E. v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).

employees" (*Roper Corp.*, 712 F.2d at 311 and cases cited therein) do not disappear simply because an employee may be swayed by those views. Where, as here, there is no finding that the employer's statement of his opinion contained any "threat of reprisal or force or promise of benefit," Section 8(c) mandates that the statement "shall not constitute or be evidence of an unfair labor practice." 29 U.S.C. § 158(c).

3. Absent reliance upon Hirsch's lawful expression of his views, the only "evidence" that the Company tainted the employees' decertification petition consists of a first-line supervisor's casual and isolated remarks to two long-time friends and co-workers.[2] This evidence cannot form the basis for a conclusion that petitioner "significantly contributed" to the loss of majority support. Accordingly, this Court should grant certiorari to correct the lower court's mistaken view of Section 8(c) and to resolve an undesirable disharmony between the Circuits on a significant question of labor management relations—the test for

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[2] The Board's presentation of the facts clouds the paucity of employer misconduct alleged in this case. In its "Statement" (br., pp. 1-2), the Board attributes to the period preceding *expiration* of the 1983-1984 collective bargaining agreement a course of conduct occurring a year earlier, prior to that agreement's *execution*. This conduct, of course, cannot be evidence of the unfair labor practices at issue because it occurred well before the statutory limitations period. *See* 29 U.S.C. § 160(b).

establishing employer "taint" of a decertification petition.[3]

Respectfully submitted,

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[3] According to the 47th Annual Report of the National Labor Relations Board, 1,964 decertification petitions were filed during the Board's fiscal year ended September 30, 1982. For that year, decertification petitions accounted for over 20% of the representation and related cases before the Board. LLR (Extra Edition), Report 733, March 11, 1986 at page 11.